

**BEFORE THE
FEDERAL MOTOR CARRIER SAFETY ADMINISTRATION**

In The Matter Of:

CSR TRANSPORT, INC.,

Respondent.

**Docket No. FMCSA-2009-0072¹
(Eastern Service Center)**

ORDER TERMINATING PROCEEDING AND CLOSING DOCKET

On July 10, 2009, the Eastern Field Administrator for the Federal Motor Carrier Safety Administration (Claimant) submitted a Notification of Settlement and Motion to Close Docket. Claimant and Respondent entered into a Settlement Agreement which resolves the matters at issue here.

The Notice of Claim, served on January 2, 2009, proposed a civil penalty of \$2,760 based on one violation of 49 CFR 391.45(b)(1)/391.11(a), using a driver not medically examined and certified during the preceding 24 months; one violation of 49 CFR 391.51(b)(4), failing to maintain the responses of each State agency to the annual driver inquiry required by 49 CFR 391.25(a); and one violation of 49 CFR 396.3(b)(3), failing to keep a record of inspection, repairs and maintenance indicating their date and nature. Under the Settlement Agreement, which was executed on July 10, 2009, and adopted as a Final Order,² Respondent agreed to pay \$2,208 in twelve consecutive

¹ The prior case number was NJ-2009-0011-NJ5164.

² Settlement Agreement, paragraph 8.

monthly payments, with \$552 of the original claim of \$2,760 suspended, contingent upon Respondent's compliance with its payment obligations.

The first three sentences of paragraph 6 of the Settlement Agreement state:

"Failure to pay in accordance with the terms of this settlement agreement shall be considered a breach of this settlement agreement and will result in the loss of any reductions and/or suspensions in penalties for claims found to be valid, and the reinstatement of the original amount claimed. The original amount claimed (less any payments previously made) will be due immediately. **For example, if any payment is not received by the due date, the payment plan set out above will be void, and the FMCSA will take steps to immediately collect the entire remaining original amount claimed.**" (Underlining supplied, boldface in original).

In *In the Matter of Golden Eagle Transit, Inc.*, Docket No. FMCSA-2009-0044, Final Agency Order: Order on Reconsideration, July 10, 2009, I held that such language, insofar as it concerned Claimant's ability to reinstate the suspended portion of the original proposed civil penalty, was invalid because it did not comply with 49 CFR 386.22(a)(1)(vi).³ In *Golden Eagle* and subsequent decisions, I stated that Claimant would not be able to seek reinstatement of the suspended amount of the original civil penalty if Respondent did not satisfactorily comply with its payment obligations under the Agreement.

Golden Eagle involved circumstances that warranted precluding the claimant in that case from seeking reinstatement of the suspended amount of the original proposed civil penalty. In *Golden Eagle*, the respondent made 17 timely payments, but forgot to make the 18th payment on time because of medical crises. All 20 payments due under the payment plan were ultimately submitted before the due date of the last payment.

³ The regulation requires the settlement agreement to provide that failure to pay may result in the loss of any reductions in penalties.

Moreover, the claimant waived his right to reinstate the original civil penalty by accepting payments after the missed payment despite the fact the Settlement Agreement provided that late payments would not be accepted. These circumstances do not exist here.

Upon further consideration, I believe that strict application of the *Golden Eagle* precedent to preclude reinstatement of suspended civil penalty amounts in all cases where the language of the Settlement Agreement runs afoul of § 386.22(a)(1)(vi) is inconsistent with basic principles of contract law and may provide an unfair windfall to motor carriers that breach a Settlement Agreement by failing to live up to their payment obligations. Consequently, instead of invalidating the first three sentences of paragraph 6 of the Settlement Agreement, I believe the better course would be to modify the Agreement to make it consistent with § 386.22(a)(1)(vi).⁴

Accordingly, I hereby modify paragraph 6 of the Settlement Agreement to provide that failure to pay in accordance with the terms of the agreement may result in the loss of any suspensions of penalties for claims found to be valid, and the reinstatement of the original amount claimed. Consequently, Claimant has the discretion not to seek reinstatement of the original amount claimed in appropriate cases, *e.g.*, where respondent makes a good faith effort to comply with the payment schedule,⁵ as well as the discretion to seek reinstatement of the original amount claimed in other cases. I

⁴ I am authorized to modify the Agreement under 49 CFR 386.22(c), which provides that the Assistant Administrator may accept or reject a Settlement Agreement, direct that proceedings in the case continue, or *take such other action as he or she deems appropriate*.

⁵ The circumstances in *Golden Eagle*, as described above, would be an example of such a case.

conclude that the Settlement Agreement, as modified, is in the public interest and is accepted.

THEREFORE, *It Is Hereby Ordered*, the Settlement Agreement, except as noted above, is the Final Order in this matter, the proceeding is terminated, and the docket is closed.



Rose A. McMurray
Assistant Administrator
Federal Motor Carrier Safety Administration

3-17-10

Date

CERTIFICATE OF SERVICE

This is to certify that on this 18 day of March, 2010, the undersigned mailed or delivered, as specified, the designated number of copies of the foregoing document to the persons listed below.

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